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No. 94-123

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ADVANCE SECURITY, INC. and
FIGGIE INTERNATIONAL INC.,
Petitioners,
v.
MARILYN M. MULHALL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

DOUGLAS S. MCDOWELL *
MCGUINESS & WILLIAMS
Suite 1200
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600
Attorney for Amicus Curiae Equal Employment Advisory Council
* Counsel of Record

August 19, 1994

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the petition of Advance Security, Inc. and Figgie International (herein "Advance"). Respondent Marilyn M. Mulhall declined EEAC's request for consent to file this brief. In support of this motion, EEAC by the following shows that its

brief brings relevant matter to the attention of this Court that has not been (or will not be) presented by the parties.

1. The Equal Employment Advisory Council is an association of employers organized to promote sound practical approaches to equal employment opportunity and affirmative action. Its membership comprises a broad segment of the private sector business community in the United States, including both individual corporations and trade associations, which themselves have hundreds of employer members interested in the foregoing purposes. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an in-depth understanding of the practical, as well as the legal aspects of equal employment policies and requirements. The members of the Council are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. As employers, EEAC's members are subject to the Equal Pay Act, 29 U.S.C. § 206(a)(1), and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, both of which involve the "equal work" standard established by the Equal Pay Act, which is the basis of the plaintiff's suit in the instant case. EEAC participated as *amicus curiae* in *County of Washington v. Gunther*, 452 U.S. 161 (1981), one of the major Supreme Court cases construing the Equal Pay Act, its legislative history and its relationship to Title VII. EEAC also published E. Livernash, *Comparable Worth Issues and Alternatives* (1980), which was cited in *Gunther* as an example of the "scholarly debate" over sex-based wage discrimination issues. 452 U.S. at 166 n.6.

3. The instant case also involves the Equal Pay Act's affirmative defense which allows differentials in pay to male and female workers for doing equal work if the differential is "based on any other factor other than sex." EEAC filed a brief in *Kouba v. Allstate Insurance Co.*,

691 F.2d 873 (9th Cir. 1982), one of the leading cases construing that defense as it applies to an employer's reliance on prior salary as a factor in setting starting salaries for new employees.

4. In its decision below, the Eleventh Circuit allowed the plaintiff to compare her position with different jobs held by eight other company executives. Three of these executives previously owned companies which they had sold to Petitioners, and their starting salaries had been set as part of the negotiations when they sold their businesses. The Eleventh Circuit's analysis involved a determination of whether these executives' jobs were "comparable" to Respondent's. In so doing, the court below effectively resurrected the "comparable work" standard, which Congress rejected when it passed the Equal Pay Act.

5. The Eleventh Circuit also allowed Respondent to compare her job to the Controller's, even though he "manages money primarily and people secondarily; [and she] manages people and things primarily and money secondarily." Such an approach is so subjective that it would allow plaintiffs to find targets of opportunity with no standards to determine what jobs are comparable.

6. The Eleventh Circuit also held that when a pay suit is brought on the same facts under Title VII, the standard for comparing jobs is "relaxed," thus making wage comparisons easier under Title VII than under the Equal Pay Act. The decision thus would make it exceedingly difficult for employers to determine which jobs are "comparable" and would allow federal agencies, courts and juries to second-guess pay practices in a way that Congress never contemplated.

7. Thus, the decision below is contrary to the decisions of this Court and to the decisions of several circuits. It would allow plaintiffs to bring Equal Pay Act and Title VII suits to challenge pay decisions for different jobs, even in the absence of intentional discrimination.

By allowing Respondent to base her suit on the "intrinsic worth or difficulty" (*Gunther*, at 166) of her job as compared with that of the jobs of other executives doing different work, the Eleventh Circuit improperly has incorporated the "comparable worth" theory into federal law. Comparable worth, however, "has been banished from our jurisprudence." *Loyd v. Phillips Brothers, Inc.*, 25 F.3d 518, 525 n. 6 (7th Cir. 1994).

8. EEAC's ongoing interest in such issues is further demonstrated by its previous participation as *amicus curiae* in several other cases involving claims of sex-based compensation discrimination. *See Glenn v. General Motors Corp.*, 841 F.2d 1567 (11th Cir.), *cert. denied*, 488 U.S. 848 (1988); *Florida v. Long*, 487 U.S. 223 (1988); *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983); *American Nurses Ass'n v. State of Illinois*, 783 F.2d 716 (7th Cir. 1986); *AFSCME v. State of Washington*, 770 F.2d 1401 (9th Cir. 1985); *Spaulding v. University of Washington*, 740 F.2d 686 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984); *Lemons v. City and County of Denver*, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980); and *IUE v. Westinghouse Electric Corp.*, 631 F.2d 1094 (3d Cir. 1980), *cert. denied*, 449 U.S. 1009 (1980).

9. EEAC seeks to assist the Court in this case by highlighting the impact its decision may have beyond the instant case, particularly as it affects the salary and wage-setting practices of major employers. Accordingly, the brief brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties. Because of its significant experience, EEAC is uniquely situated to brief this Court on the relevant concerns of the business community and the significance of this case to employers generally.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council respectfully requests that the

Court grant its motion to participate in this case as *Amicus Curiae.*

Respectfully submitted,

DOUGLAS S. MCDOWELL *
MCGUINESS & WILLIAMS
Suite 1200
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600
Attorney for Amicus Curiae
Equal Employment
Advisory Council

August 19, 1994

* Counsel of Record

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae*, contingent upon the granting of the accompanying motion for leave. The brief supports the petition for a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

EEAC is a national employers association representing a broad segment of the private sector business community. Its member representatives are experts (both human relations professionals and corporate labor counsel) responsible for corporate affirmative action and nondiscrimination policies. Their combined experience gives EEAC an in-depth understanding of the practical, as well as legal aspects of equal employment policies and requirements.

EEAC's members are subject to the requirements of the Equal Pay Act and Title VII of the Civil Rights Act of 1964, both of which prohibit certain types of sex-based compensation discrimination. Therefore, EEAC's members have a direct interest in the outcome of the instant case. The decision below allowed the plaintiff to compare her salary and other compensation with that of male executives doing "comparable" work. EEAC's members are concerned that the decision below improperly disregarded the "equal work" standard of the Equal Pay Act and resurrected the discredited theory of comparable worth.

Thus, the decision below directly affects EEAC's members, as it conflicts with several court decisions and is directly contrary to the language and purposes of the Equal Pay Act and Title VII.[1]

STATEMENT OF THE CASE

The plaintiff below, Marilyn Mulhall, alleged that she was subject to sex-based wage discrimination because she was paid less than male employees of her employer, Advance Security, Inc. ("Advance"). The case is factually complex because she has attempted to compare her wages with those of eight different male comparators in different jobs, and has sued under two different federal statutes—the Equal Pay Act (EPA)[2] and Title VII of the Civil Rights Act of 1964.[3]

Mulhall was Advance's Vice President of Administration. She performed a number of administrative functions.[4] She resigned her position in 1991. Her suit al-

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[1] The interests of EEAC are also set out in more detail in the attached motion to file this brief.

[2] 29 U.S.C. § 206(d).

[3] 42 U.S.C. § 2000e, *et seq.*

[4] Her duties included risk management, personnel, loss prevention, salary administration, workers compensation, purchasing,

leges that she was paid substantially less in salary, benefits and bonuses than eight male comparators in four comparator categories: (1) three managers working on two separate contracts with government agencies to provide security systems; (2) an individual hired to start up a new division, Investigations Corporation of America; (3) Advance's Vice-President, Controller, with overall responsibility for Advance's financial activities; and (4) three individuals who were owners or principles in businesses that were purchased by Advance and whose salaries with Advance were negotiated as part of the sale terms.

The district court below adopted the magistrate's Report and Recommendation to grant summary judgment dismissing plaintiff's Equal Pay Act and Title VII claims. Pet. App. A-35 to A-65.[5] The Eleventh Circuit, however, reversed the district court, except for the Category 2 claim where the circuit found that the job performed by the plaintiff was not substantially similar to that performed by the comparator. Pet. App. A-1 to A-34.

The Eleventh Circuit stated that "[t]he success of plaintiff's suit under both the EPA and Title VII rests on the comparison of her pay and job functions with those persons whom she designates as "comparators." Pet. App. A-6. The holdings of the courts below can be summarized as follows:

Category 1, Project Managers. Plaintiff alleged she was paid less than three male employees who manage projects to provide security at the Sandia National Laboratories in Tonapah, Nevada, and Livermore, California. The Eleventh Circuit reversed the district court's conclusion that the plaintiff's Equal Pay Act claims should be dismissed because the plaintiff worked in At-

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litigation, insurance programs, payroll, benefits, labor relations, licensing, leases, and corporate services. Pet. App. at A-5.

[5] "Pet. App." references are to the appendix to Advance's petition for writ of certiorari.

lanta, Georgia, and thus was not working in the same "establishment" as the comparators, as required by the EPA.

Category 2, Investigator. Neither the district court nor the Eleventh Circuit could accept Mulhall's argument that her compensation could be compared with William Hill's, who was hired from Wackenhut Corporation to head up a new division of Investigations. Both courts found that Mulhall did not state a *prima facie* EPA claim that her job was equal to Hill's, as Hill's job had different skills, effort, responsibility and working conditions: he was an investigator hired to create a new line of business and develop a new client base. (Pet. App. A-15 to A-17; A-45 to A-46).

Category 3, Controller. Mulhall then turned her sights on Larry Nelson, Advance's Controller—the company's "chief accounting/finance position . . . [with] responsibility for *all* of defendant Advance's financial and accounting functions." (Pet. App. A-47, emphasis in the original). The district court dismissed Mulhall's EPA claim as her administrative job was not equal to Nelson's financial job. *Id.*

The Eleventh Circuit framed the facts as follows:

> Defendants apparently believe that the ultimate responsibility for corporate money is greater in kind than the ultimate responsibility for administration of the business as a whole. *One vice president manages money primarily and people secondarily; the other manages people and things primarily and money secondarily.* [Pet. App. A-21, emphasis added].

Nevertheless, the circuit court did not agree with the district court that the duties were not substantially similar. The Eleventh Circuit observed that "Advance's economic well-being is the controller's main responsibility, but he also manages a staff and credit collection and billing—functions steeped in the administrative tradition." *Id.* at A-19. But it observed that "monetary concerns permeate all aspects of plaintiff's position." *Id.*

Category 4, Former Officials Of Purchased Businesses. Mulhall also felt she should have been paid the same as company officials who previously owned or were principals in security companies purchased by Advance and who stayed on as Advance's employees. They held different jobs than performed by Mulhall. Two of these men were Vice Presidents, Operations; the other was a Regional Manager. Pet. App. A-47 to A-48.

The district court found that the employer had proven a "factor other than sex" defense under the EPA, since "[t]he salaries of these three men were part of the consideration they received for the negotiated sale of their businesses to the defendant." Pet. App. A-49. The district court held that the EPA permitted Advance to "red circle" these wages for a period of time after these former officials sold their businesses to Advance. *Id.* at 50.

The Eleventh Circuit reversed the district court and held that the pay differential could not be justified by the "comparators' superior experience, training or ability, or exigent business circumstances. . . ." Pet. App. A-25. In rejecting the employer's "red circling" defense, the Eleventh Circuit stated that it knew of no court decision:

> explicitly extending the red-circling affirmative defense to a situation involving *new* employees paid higher wages than existing employees in *comparable* jobs.[6]

The court also stated that it was convinced by the legislative history of the EPA that the red-circle defense did not apply:

> where a plaintiff makes a *prima facie* case of discriminatory wage differential between herself and new employees brought into the organization to fill *comparable positions.* [Pet. App. A-23, emphasis added].

Further, the Eleventh Circuit stated that the employer could not rely on the "market forces" that brought about

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[6] Pet. App. A-23, emphasis of "new" in the original; emphasis of "comparable" added.

the purchase agreements for the merged companies, because the employer did not make post-hiring salary adjustments to reflect the plaintiff's superior performance. Pet. App. A-24. The court's decision stated that the company's argument "comes precariously close to the market force justification for disparate wages long rejected as a legitimate affirmative defense, citing *Corning Glass Works v. Brennan,* 417 U.S. [188,] at 205 [(1974)]." Pet. App. A-24 n.22.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The decision below effectively substitutes a "comparable work" standard for the "equal work" standard of the Equal Pay Act and Title VII. It thereby opens the door to wide-ranging attacks on employers' compensation systems, especially for highly-placed executives performing admittedly different job tasks and functions. None of the "comparator" jobs in this case could be said to be "equal" to Mulhall's job. Yet, the Eleventh Circuit allowed the jobs to be compared to see whether they were "comparable." This analysis is directly contrary to the history of the EPA, which shows that Congress deleted the "comparable work" test from the bill and substituted the "equal work" standard in order to limit EPA suits to comparisons of jobs that involved the same job tasks or functions. *County of Washington v. Gunther,* 452 U.S. 161, 184-89 (1981) (Rehnquist, J., dissenting).

The decision below also conflicts with the holdings of other circuits, in that it applies the shifting burden of proof scheme of *McDonnell Douglas v. Green,* 411 U.S. 792, 802 (1973). The court below held that "the standard for 'similarity', under the Equal Pay Act is *"relaxed"* when the suit is analyzed under Title VII. Other circuits, however, have held that in the absence of intentional wage discrimination, the Equal Pay Act's equal work standard applies equally to Title VII suits. *Spaulding v. University of Washington,* 740 F.2d 686, 700 (9th Cir.), *cert. denied,* 469 U.S. 1036 (1984). Similarly, the *McDonnell Douglas* "approach would inject into the liability analysis notions

of comparable worth which under prevailing statutory conditions have been banished from our jurisprudence." *Loyd v. Phillips Brothers, Inc.*, 25 F.3d 518, 525 & n.6 (7th Cir. 1994).

Finally, the Eleventh Circuit's rejection of the employer's "factor other than sex" defense for setting the wages of three former business owners as part of the negotiated consideration for the purchase of these executives' businesses raises important issues warranting this Court's review. EEAC's members are extremely concerned that the decision below will make it virtually impossible to negotiate salaries in the labor market based upon experience, training, ability or exigent, business-related circumstances, without having those salaries second-guessed under the Equal Pay Act or Title VII.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION ALLOWING A PLAINTIFF IN A SEX-BASED PAY DISCRIMINATION CASE TO ALLEGE THAT SHE WAS PAID DIFFERENTLY THAN MEN WHO PERFORM DIFFERENT BUT "COMPARABLE" JOBS IS CONTRARY TO THE PROVISIONS OF THE EQUAL PAY ACT AND TITLE VII, CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS, AND CREATES NEEDLESS CONFUSION OVER WHAT LEGITIMATE FACTORS MAY BE USED TO DIFFERENTIATE PAY, PARTICULARLY IN UPPER-LEVEL MANAGEMENT POSITIONS

A. Introduction

The court below permitted a wide-ranging attack on an employer's pay practices by allowing the plaintiff to compare her pay with that of several executives who performed different job tasks and functions. The only common theme in her allegations was that she was paid less than the male comparators. The dissonance of her arguments is found in the wide disparity in the job tasks she sought to compare.

By permitting such an unstructured approach to sex-based pay discrimination cases, the decision below leaves employers vulnerable to *ad hoc* and arbitrary comparisons of the salaries of different jobs and makes it impossible to predict which comparisons are appropriate. Thus, if the decision below stands, even the most conscientious employer will be unable to predict which jobs should be compared, much less whether a jury, judge or governmental agency will agree with the employer's comparisons.

The law prohibits intentional, sex-based wage decisions. It also requires that persons performing substantially the same job tasks or functions be paid the same unless the pay differential is based on reasons unrelated to the sex of those who hold the jobs. The decision below, however, allows the types of wage comparisons that Congress and the Courts repeatedly have said are not permitted under federal law.

B. When It Crafted The Equal Pay Act, Congress Intentionally Deleted Language That Would Have Required The Same Pay For "Comparable" Work. Congress Substituted The "Equal" Work Standard To Limit Comparisons To Substantially Similar Jobs

It is well-accepted that "[t]he controlling factor under the Equal Pay Act is job content—the actual duties of the job." *Waters v. Turner, Wood & Smith Ins. Agency, Inc.*, 874 F.2d 797 (11th Cir. 1989) (rejecting plaintiff's "bootstrapping argument" that "inside" and "outside" sales positions were equal). *Accord Horner v. Mary Institute*, 613 F.2d 706, 714 (8th Cir. 1979) (although "superficially identical," the plaintiff did not prove that the actual job requirements and performance as a physical education teacher were the same as a male physical education teacher).

The Eleventh Circuit, however, departed from these principles in several ways in this case, thereby permitting comparisons under the Equal Pay Act of jobs that clearly

were not the same. Indeed, the court's opinion explicitly indicates at several points that a *prima facie* case of discrimination can be based on evidence that the employer paid different wages to employees working in jobs deemed merely "comparable." The court thus skipped over the requisite determination of whether these jobs were "equal" and jumped directly to a comparison of the overall skill, effort and responsibility required in the respective jobs.

In enacting the Equal Pay Act and Title VII, however, Congress did not permit the courts or administrative agencies to find a *prima facie* case of sex-based wage discrimination based on a comparison of different, albeit "comparable" jobs. Those statutes were not designed to substitute judicial determinations for business judgments and market processes.

Indeed, it was specifically because Congress did not want the courts and federal agencies to become mired in making comparisons of different jobs that it adopted the "equal work" standard. The Equal Pay Act was the result of an intensive and wide-ranging inquiry into pay discrimination against women. Although the widespread problem that Congress addressed was copiously documented, "[t]he most notable feature of the history of the Equal Pay Act is that Congress recognized early in the legislative process that the concept of equal pay for equal work was more readily stated in principle than reduced to statutory language which would be meaningful." *Corning Glass Works v. Brennan*, 417 U.S. 188, 198 (1974).

The original language in the legislation in 1962 would have authorized broad involvement by the courts in situations of alleged wage discrimination by requiring equal pay for "comparable work."[7] In 1962, however, the

[7] Congress deleted the word "comparable" in the Equal Pay Act and substituted the "equal work" standard. A complete discussion of the relevant legislative history of this change is found in Chief Justice (then-Justice) Rehnquist's dissenting opinion in *County of Washington v. Gunther*, 452 U.S. 161, 184-189 (1981). This history shows that, in Congress' view, "government intervention to equalize

House deleted the "comparable work" standard and substituted the "equal work" standard. In introducing the new language, Rep. St. George explained that there is a great difference between the terms equal and comparable: "The word 'comparable' opens up great vistas. It gives tremendous latitude to whoever is to be the arbitrator in these disputes." [8] Congress, therefore, prevented the courts from making wage comparability determinations.

The 1963 House debates repeated this theme. Rep. Goodell stated:

> I think it is important that we have clear legislative history at this point. Last year when the House changed the word "comparable" to "equal" the clear intention was to narrow the whole concept. We went from "comparable" to "equal" meaning that the jobs involved would be *virtually identical,* that is, they would be very much alike or closely related to each other.

109 Cong. Rec. 9197 (1963). In the several instances where the Eleventh Circuit allowed the plaintiff to determine the comparability of jobs to establish a *prima facie* case, its analysis was directly at odds with the language, purposes and history of the Equal Pay Act.

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wage differentiation was to be undertaken only within one circumstance: when men's and women's jobs *were identical or nearly so . . .*" *Id.* at 188. A full exposition of this issue also is found in E. Livernash, *Comparable Worth: Issues and Alternatives,* Equal Employment Advisory Council (1980), at 212-221, which was cited in *Gunther* as an example of the "scholarly debate" over wage discrimination issues. 452 U.S. at 160 n.6.

[8] 108 Cong. Rec. 14767 (1962). See also the remarks of Rep. Landrum, *id.* at 14768, who stated that the "equal work" amendment would prevent "the trooping around all over the country of employees of the Labor Department harassing business with their various interpretations of the term 'comparable' when 'equal' is capable of the same definition throughout the United States."

C. The Eleventh Circuit Improperly Compared The Skill, Effort And Responsibility Of "Comparable" Jobs In Violation Of The "Equal Work" Standard

With respect to the Controller's job, the Eleventh Circuit found that the jobs could be equal, even though "[o]ne vice president manages money primarily and people secondarily; the other manages people and things primarily and money secondarily." Pet. App. A-21. The court seems to feel that these jobs could be compared because both involved administrative tasks and various degrees of monetary functions.

But the record clearly indicates that Mulhall did numerous jobs that were *not* done by the Controller.[9] And the Controller was responsible for the defendant's accounting and financial functions, including credit collection and bills—tasks which were not required of Mulhall. In light of these differences in job functions, the court of appeals clearly erred in holding that the plaintiff had made out a *prima facie* case under the Equal Pay Act.

The Eleventh Circuit's decision thus conflicts with numerous other decisions, which are set out in *Ratts v. Business Systems*, 686 F. Supp. 546, 550 (D.S.C. 1987), which rejected plaintiffs' attempts to show that "executive jobs were of equal importance to the success of the company." As the court stated, "the fact remains that the *duties* of the vice presidents were not sufficiently similar." *Id.* at 550. The court in *Ratts* explained:

> While all vice presidents performed similar tasks such as supervision of employees, corporate decision making, participation in trade shows and the general goal of selling a product, each executive performed different and additional duties which resulted in their jobs not being substantially equal. The task of comparing executive/management positions is a difficult

[9] She was responsible for risk management, personnel, loss prevention, salary administration, workers compensation, litigation, insurance programs, payroll, benefits, labor relations and corporate services. Pet. App. at A-5.

> one. *Allegations of Equal Pay Act violations have routinely been rejected by courts applying the equal work standard to jobs involving executive and management positions.*

686 F. Supp. at 550 (emphasis added) and cases there cited.[10]

D. The Eleventh Circuit Applied An Improper Burden Of Proof In Holding That The Equal Work Standard Is "Relaxed" When Applied Under Title VII. This Approach Conflicts With The Decisions Of Other Circuits And, As The Seventh Circuit Stated, Opens The Door To "Comparable Worth Claims" Under Title VII

Employers also are concerned about the burden of proof analysis used by the Eleventh Circuit to analyze the plaintiff's Title VII claims. Instead of applying the "equal work" standard, the court stated that a plaintiff can make a Title VII *prima facie* case by "showing that she is a female and her job is *substantially similar* to higher paying jobs occupied by males." A-27 (emphasis added). The court also ruled that "the standard for 'similarity' under the Equal Pay Act is *relaxed*." A-27 (em-

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[10] We also are concerned that the decision below would bolster an attempt to modify the equal work standard based on a "sliding scale" analysis using "some degree of comparability plus some combination of [other] factors." *Spaulding v. University of Washington*, 740 F.2d 686, 701 (9th Cir.), *cert. denied*, 469 U.S. 1036 (1984). In rejecting this approach, the Ninth Circuit stated it would pose the danger of "plunging courts into standardless supervision of employer/employee relations." 740 F.2d at 701.

This case provides a good example, where the court below observed that Mulhall was responsible for monitoring EEO and affirmative action policies, and that a discrimination suit could have a devastating financial impact on the company. Pet. App. A-21 at n.19. Or course, the same could be said of most corporate executives performing different jobs posing a threat of high potential liability, such as directors of benefits, occupational safety and health, or corporate securities. There is nothing in the Equal Pay Act that allows comparisons to be made based upon the financial liability that could result from poor performance of different work.

phasis added), citing *Miranda v. B&B Cash Grocery Store*, 975 F.2d 1518, 1526 (11th Cir. 1992).

In reaching this conclusion, the court below misapplied the burden of proof analysis for disparate treatment cases found in *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973). *McDonnell Douglas* establishes a 3-step burden of proof scheme: plaintiff's *prima facie* case; articulation of the employer's legitimate reasons; and plaintiff's proof of employer pretext. The Eleventh Circuit's burden of proof scheme, however, raises conflicts with the decisions of this Court and other circuits that should be resolved by this Court.

In *County of Washington v. Gunther*, 452 U.S. 161 (1981), this Court rejected arguments that Title VII and the Equal Pay Act were on all fours in the types of sex-based compensation claims that could be brought under federal law. *Gunther* held that Title VII was broader than the Equal Pay Act in that plaintiffs could bring suits for "intentional" or "blatantly discriminatory practices" even when the plaintiff might not be able to meet the equal work standard. Contrary to the decision below, however, *Gunther* did not hold that the "equal work" standard is "relaxed" when that standard is used under Title VII. Pet. App. A-27.

After this Court's decision in *Gunther*, the Ninth Circuit unequivocally reconfirmed its earlier holding that:

> Under *Gunther*, it is certain that if the nursing faculty were to base its [Title VII] *prima facie* case only on a comparison of the work performed, it would have to show substantial equality, 623 F.2d at 1321. We stated that "because a comparable work standard, cannot be substituted for an equal work standard *evidence of comparable work*, although not necessarily irrelevant in proving discrimination under some alternative theory, *will not alone be sufficient to establish a prima facie case.*" *Id.* Thus, the nursing faculty has failed to establish a Title VII claim on an equal pay for equal work theory for the same

> reasons that we concluded it failed to establish a *prima facie* Equal Pay Act claim.

Spaulding v. University of Washington, 740 F.2d at 700.[11]

Spaulding thus cited to the Ninth Circuit's earlier supplemental opinion in *Gunther*, 623 F.2d 1303, 1321 (9th Cir. 1979). There, the Ninth Circuit also explained its holding:

> The effect of our decision will not be to substitute a "comparable" work standard for an "equal" work standard. Where a Title VII plaintiff claiming wage discrimination attempts to establish a *prima facie* case based solely on a comparison of the work she performs, *she will have to show that her job requirements are substantially equal, not comparable, to that of a similarly situated male.*

Id. (emphasis added).

In contrast, as Advance forcefully and correctly argues in its petition, the Eleventh Circuit essentially adopted the "comparable worth" theory in this case when it allowed this suit to proceed based on a comparison of different job functions and tasks. "Comparable worth" is the "controversial concept":

> under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic *worth or difficulty* of their job with that of other jobs in the same organization or community.

Gunther, 452 U.S. at 166 (emphasis added). The Eleventh Circuit's meager response to this argument—that "plaintiff's argument does not, by definition, depend on comparable worth . . ." (A-24)—reflects the Court's fundamental failure to understand the difference between the "comparable" and "equal" work standards.

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[11] Judge Schroeder's specially concurring opinion agreed with the majority that "the plaintiffs in this case did not prove any violation of the Equal Pay Act because they failed to show that their jobs were substantially equal to the comparator jobs used." 740 F.2d at 709.

Without repeating the facts of this case, however, the record is replete with Mulhall's attempt to show that her job was just as "difficult," valuable or responsible as different jobs held by male executives. The Eleventh Circuit also made repeated comparisons of the profitability of various jobs, apparently to show how much they were worth to the employer. *See, e.g.*, Pet. App. A-24 n. 23. Thus, the planitiff's case and the Eleventh Circuit's analysis falls squarely within this Court's definition of "comparable worth." The Eleventh Circuit's decision thus conflicts with numerous other circuit decisions rejecting "comparable worth" as a viable theory of liability under Title VII. *See, e.g., Loyd v. Phillips Brothers, Inc.*, 25 F.3d 518, 525 (7th Cir. 1994); *AFSCME v. State of Washington*, 770 F.2d 1401, 1406 (9th Cir. 1985); *Int'l Union, UAW v. Michigan*, 886 F.2d 766, 769 (6th Cir. 1989).

Recently, the Seventh Circuit recognized that the burden of proof approach used by the court below, particularly reliance on the *McDonnell Douglas* structure, improperly injects notions of comparable worth into pay discrimination cases. Thus, the Seventh Circuit ruled that although Title VII allows pay discrimination suits where the equal work standard has not been met:

> There must be an intent to discriminate and the intent must encompass an actual desire to pay women less than men because they are women. . . . When comparing male and female remunerations in dissimilar jobs, this becomes a rather demanding standard, whose particularity does not allow for proof via an assumption-laden scheme of *prima facie* cases, presumptions and rebuttal, but rather requires that the plaintiff persuade the fact-finder that a sex-based compensation program was at work.

Loyd v. Phillips Brothers, Inc., 25 F.3d 518, 525 (7th Cir. 1994).

As "contra" authority, the Seventh Circuit cited to the Eleventh Circuit's decision in *Miranda v. B&B Cash*

Grocery Store, which the Eleventh Circuit in the instant case cited as authority for using the *McDonnell Douglas* standard. Pet. App. A-27. Judge Flaum's decision explained how the Eleventh Circuit's approach could lead to "comparable worth":

> Our point is that the *McDonnell Douglas* burden-shifting scheme does not import well into an area where wage discrimination claims are based on pay differences between dissimilar jobs. *The approach would inject into the liability analysis notions of comparable worth which under prevailing statutory conditions, have been banished from our jurisprudence.* A Title VII wage-discrimination plaintiff comparing wage rates in dissimilar jobs retains at all times the burden of convincing the fact finder, without resort to shifting burdens or similar procedural devices, that her employer intended to suppress her wages on account of her sex (or other protected characteristics).

25 F.3d at 525 n. 6 (emphasis added).

Under these conflicting decisions, employers with nationwide operations will face extreme difficulties in determining how to evaluate their pay practices for compliance with the Equal Pay Act and Title VII. Given these direct conflicts with the decision below, the instant case should be reviewed in order to clarify the appropriate burden of proof for wage discrimination claims under Title VII.

E. The Eleventh Circuit's Narrow Reading Of The "Factor Other Than Sex" Defense Eliminates Many Legitimate Factors Permitted By Other Court Decisions And Creates Confusion In Designing Permissible Salary Systems

As noted, the court below refused to credit the employer's "factor other than sex" defense in setting the salaries of three of its executives. The employer argued that:

> the comparators were formerly owners or principals in businesses purchased by Advance and their salaries were set as part of the negotiated sale of the business.

Pet. App. A-22. The court of appeals, however, stated that the employer had not cited to any case extending the "red circling" defense to a situation where the employer paid a *new* employee higher wages than existing employees in "comparable jobs." Pet. App. A-23. This analysis conveniently overlooks the fact that the Equal Pay Act does not even apply to pay differentials in "comparable" jobs. See above, pp. 8-12. As the plaintiff has not even established a *prima facie* case, the Equal Pay Act defenses should not even come into play.

Moreover, the Eleventh Circuit stated that the new employees' "superior experience, training or ability, or exigent business circumstances" could not justify their greater compensation, as compared with Mulhall's relatively better performance both before and after the comparators arrive at the company. Pet. App. A-25. This holding of the Eleventh Circuit directly conflicts with another holding in the same circuit which states:

> The legislative history [of the Equal Pay Act] indicates that the "factor other than sex" exception applies when the disparity *results from unique characteristics of the same job; from an individual's experience, training, or ability; or from exigent circumstances connected with the business.*

Glenn v. General Motors Corp., 841 F.2d 1567, 1571 (11th Cir.) (emphasis added), *cert. denied*, 488 U.S. 848 (1988).

Moreover, it is evident that the Eleventh Circuit's analysis is overly rigid and would jeopardize many common, legitimate pay practices that are sex neutral. Thus, the "factor other than exception was intended by Congress to be a 'broad general exception.'" *EEOC v. Maricopa County Community College Dist.*, 736 F.2d 510, 514 (9th Cir. 1984).

In addition, the "factor other than sex" exception is not limited to factors such as the difficulty or type of duties that actually are needed to perform the job in question. *Kouba v. Allstate*, 691 F.2d 873, 876-77 (9th Cir. 1982). An employer can rely on a wage-setting factor based on "an acceptable business reason" as long as the factor is used "reasonably in light of the employer's stated purposes as well as its other practices." *Id.* at 877.

For example, Aetna Insurance Company hired a new underwriter with over 15 years of underwriting experience. The EEOC argued that Aetna violated the Equal Pay Act because a female underwriter was paid less for performing the same job. The court accepted Aetna's sex-neutral explanation that it had different compensation systems for existing and new employees.[12] In rejecting the EEOC's argument that the salary program was too subjective, the Fourth Circuit stated:

> Aetna needed an experienced casualty underwriter to fill the void . . . but, more importantly, it needed an agent to expand its business in the commercial casualty field. Archer had a strong background in the commercial casualty area; he had supervisory experience; and he demonstrated in his interview that he had the personality traits to succeed as an underwriter and later as a manager.[13]

Numerous other courts have approved employer wage-retention policies that were applied neutrally and relied on factors that did not involve sex. *Covington v. Southern Illinois University*, 816 F.2d 317 (7th Cir.), *cert. denied*, 484 U.S. 848 (1987) (approved university's policy of retaining employees' salaries upon change of assignment); *Christiana v. Metropolitan Life*, 839 F. Supp. 248 (S.D.N.Y. 1993), and cases there cited (upholds company-wide and location-wide salary retention policies); *Derouin v. Louis Allis Division, Litton Industrial Products, Inc.*, 618 F. Supp. 221, 225 (E.D. Wis. 1984) (Employer may legitimately encourage "nonsupervisory pro-

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[12] *EEOC v. Aetna Insurance Co.*, 616 F.2d 719 (4th Cir. 1980).

[13] 616 F.2d at 726.

duction employees with high wage rates to apply for supervisory positions without taking pay cuts").[14]

Moreover, the "factor other than sex" exception seems ideally suited for the instant case. The three comparators were former owners and principals of businesses which they sold to Advance. Presumably their new wages at Advance did not simply include payment for work to be performed post-sale. Their wage levels would have included consideration for providing Advance with a going concern, remuneration for the assets and good will of the business, and reward for all risk and initiative in starting up and maintaining a successful business enterprise.[15]

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[14] Other cases approving similar wage retention policies include: *Grove v. Frostburg National Bank*, 549 F. Supp. 922, 937 (D.Md. 1982); *Groussman v. Respiratory Home Care, Inc.*, 40 Fair Empl. Prac. Cas. (BNA) 122 (C.D.Cal. 1986); *Riordan v. Kempiners*, 831 F.2d 690, 699 (11th Cir. 1987); *Gosa v. Bryce Hospital*, 780 F.2d 917 (11th Cir. 1986); *Ciardella v. Carson City School Dist.*, 671 F. Supp. 699, 701 (D.Nev. 1987); *Blocker v. AT&T Technology Systems*, 666 F.Supp. 209, 214 (M.D.Fla. 1987) (policy not based on sex and appears reasonable in order to enhance the desirability of employment and to provide security for employees); *Mangiapane v. Adams*, 20 Fair Empl. Prac. Cases (BNA) 699 (D.D.C. 1979); *Hodgson v. Lenkurt Electric Co.*, 20 WH Cases 1044 (N.D. Cal. 1972); *EEOC v. Samedan Oil Corp.*, 29 Empl. Prac. Dec. (CCH) ¶ 32,901 (E.D. Okla. 1982); *Adams v. Univ. of Washington*, 722 P.2d 74 (Wash.Sup.Ct. 1986) (permissible to maintain wage rates of skilled employees in economic reorganization in order to mitigate effects of demoralizing wage adjustment during reassignment of job functions); *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1029-30 (6th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984). *See also Hodgson v. Robert Hall Cloths, Inc.*, 473 F.2d 589, 594-96 (3d Cir. 1973), *cert. denied sub nom. Brennan v. Robert Hall Clothes, Inc.*, 414 U.S. 866 (1973).

[15] In response to Advance's argument that these wages were part of the larger negotiation picture surrounding the purchase of the comparator's businesses, the Eleventh Circuit stated that this argument "comes precariously close to the market force justification for disparate wages long rejected as a legitimate affirmative defense. *Corning Glass Works*, 417 U.S. at 205." Pet. App. A-24 n.22. *Corning Glass*, however, rejected a defense based on the fact that the sex-based "differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job

In short, the Eleventh Circuit's decision greatly confuses the law applicable to employer pay practices. Not only did the court allow the plaintiff to compare her job tasks and performance with comparators who did different work, the court then refused to allow the employer to justify its pay practices by relying on legitimate factors that were completely neutral and unrelated to sex. This decision thus brings into question the legitimacy of common business practices used to set the salaries of executives hired from outside the company. The conflicts between the court below and other circuits should be resolved by this Court.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

DOUGLAS S. MCDOWELL *
MCGUINESS & WILLIAMS
Suite 1200
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600

Attorney for Amicus Curiae
Equal Employment
Advisory Council

* Counsel of Record

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market in which Corning could pay women less than men for the *same work*." 417 U.S. at 205 (emphasis added).

In the instant case, Mulhall and the comparators were performing *different* work. Moreover, there is nothing in the record to show that, similar to the night shift differential in *Corning Glass*, there was a pay policy specifically based on sex. Accordingly, absent a showing of intent to discriminate on the basis of sex, the courts routinely have permitted employers to rely upon the labor market to set wages for different jobs. *See, e.g., Christensen v. State of Iowa*, 563 F.2d 353 (8th Cir. 1977); *Lemons v. Denver*, 783 F.2d 716 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980); *Spaulding v. State of Washington*, 740 F.2d 686; *AFSCME v. State of Washington*, 770 F.2d 1401, 1404 (9th Cir. 1985); and *UAW v. Michigan*, 886 F.2d 766, 769 (6th Cir. 1989).